Kwan Kwok Kwong & Anor v Trenolo Resources Sdn Bhd

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(L)–709 OF 1999
JEFFREY TAN J
29 JUNE 2000

Land Law *— Sale and purchase — Construction of agreement — Encumbrances upon property — Failure of vendor to discharge parcel — No strata title issued — Whether vendor obliged immediately upon receipt of full purchase price to convey property to purchaser — Whether vendor may encumber parcel until issuance of strata title*

By an agreement dated 1 June 1995 ('the agreement') entered into between the defendant as vendor and the plaintiffs as purchasers, the defendant sold and the plaintiffs purchased a commercial unit ('the parcel') erected on a piece of land ('the land'). By 18 December 1996, the plaintiffs had fully paid up the purchase price. The land was charged to a bank and a strata title of the parcel was yet to be issued. The plaintiffs contended that the defendant had breached the agreement because of their failure to discharge the parcel. The defendant contended that cl 15 of the agreement permitted the defendant to utilise the parcel as a loan security until the issuance of the strata title to the parcel. The plaintiffs made an application to the court for an adjudication on the following agreed issue: whether the provisions of the agreement in particular cll 13, 15, 20 and 23 permitted the defendant to use and/or encumber the subject property purchased by the plaintiffs until the issuance of the strata title or only until full payment of the purchase price.

Held:

(1) Looking at the agreement as a whole, it was most evident that the intention of the plaintiffs was to buy whilst the intention of the defendant was to sell the parcel. That mutual exchange was at the heart and soul of the bargain and all provisions of the agreement functioned to implement and to see through that bargain. As a rule, a vendor of immovable property free from encumbrances is obliged, immediately upon his receipt of the full purchase price from the purchaser, to convey the full benefits of both the legal and beneficial ownership of the immovable property to the purchaser. And it was no different in the present case, although the strata title was yet not issued (see pp 740E–F, I–741A, C).

(2) Clauses 13 and 23 were intended to protect the defendant from liability for any official delay in the issuance of the strata title occasioned by the issuing authority. They were not intended to shield the defendant from liability for their own delay. Undoubtedly if there was a document of title, cl 13 would not have been required and cl 23 would not read as in the present

form. Rather, just as in cases of all dealings with document of titles, cl 23 should read, to the effect that the defendant shall execute a valid and registrable transfer of the parcel upon full payment of the purchase price. Plainly, cll 13 and 23 were so phrased only to deal with the one particular circumstance — that there was no document. Clauses 13 and 23 were not to provide for an encumbrance created by the defendant until the issuance of a document of title. Reasonably, that must be the construction of cll 13 and 23 (see pp 741H–742A).

(3) Unquestionably, the plaintiffs purchased the parcel free from land charges. Beyond question, the defendant must redeem the parcel for the plaintiffs. Only the execution of a valid and registrable memorandum of transfer was agreed to be deferred. Without a document of title, that was probably the only solution. But other than formal registration, the plaintiffs were entitled, upon payment of the full purchase price, to the full benefits of both the legal and beneficial ownership of the parcel. And the existing encumbrance which could render the plaintiffs' legal and beneficial ownership effectively or substantially worthless could be 'discharged', unlike the formal registration of the plaintiffs' title, even without a document of title. Without doubt, the provisions of the agreement did not permit the defendant to use and/or to encumber the parcel until the issuance of the strata title, only until full payment of the purchase price (see p 742E–H).

[Bahasa Malaysia summary

Melalui suatu perjanjian bertarikh 1 Jun 1995 ('perjanjian tersebut') yang dimasuki antara defendan sebagai penjual dan plaintif-plaintif sebagai pembeli-pembeli, defendan telah menjual dan plaintif-plaintif telah membeli satu unit komersial ('bahagian tersebut') yang didirikan di atas sebidang tanah ('tanah tersebut'). Menjelang 18 Disember 1996, plaintif-plaintif telah membayar secara penuh harga pembelian tersebut. Tanah tersebut telah digadaikan kepada bank dan hak milik strata bahagian tersebut belum lagi dikeluarkan. Plaintif-plaintif menegaskan bahawa defendan telah melanggar perjanjian tersebut kerana kegagalan melepaskan gadaian ke atas bahagian tersebut. Defendan menegaskan bahawa fasal 15 perjanjian tersebut membenarkan defendan untuk menggunakan bahagian tersebut sebagai jaminan pinjaman sehingga pengeluaran hak milik strata untuk bahagian tersebut. Plaintif-plaintif telah membuat permohonan kepada mahkamah untuk penentuan isu-isu berikut yang telah dipersetujui: sama ada peruntukan-peruntukan perjanjian tersebut di dalam fasal 13, 15, 20 dan 23 membenarkan defendan untuk menggunakan dan/atau memasukkan bebanan ke atas subjek hartanah tersebut yang dibeli oleh plaintif-plaintif sehingga pengeluaran hak milik strata atau hanya sehingga pembayaran penuh harga pembelian.

Diputuskan:

(1) Melihat kepada perjanjian tersebut secara menyeluruh, adalah jelas bahawa niat plaintif-plaintif adalah untuk membeli sementara niat defendan adalah untuk menjual bahagian tersebut. Pertukaran yang dipersetujui tersebut adalah asas dan dasar kepada persetujuan tersebut dan semua peruntukan-peruntukan perjanjian tersebut berfungsi untuk melaksanakan atau memastikan persetujuan tersebut dicapai. Adalah suatu kaedah bahawa penjual suatu hartanah tak alih yang bebas daripada bebanan-bebanan mestilah, selepas penerimaan harga pembelian secara penuh daripada pembeli, memindahkan kepentingan sepenuhnya dari segi pemunyaan undang-undang dan benefisial hartanah tak alih tersebut kepada pembeli. Dan tiada bezanya bagi kes ini, walaupun hak milik strata belum lagi dikeluarkan (lihat ms 740E–F, I–741A, C).

(2) Fasal-fasal 12 dan 13 adalah berniat untuk melindungi defendan daripada liabiliti untuk sebarang kelewatan rasmi di dalam pengeluaran hak milik strata yang disebabkan oleh pihak berkuasa yang mengeluarkannya. Ia tidak berniat untuk melindungi defendan daripada liabiliti untuk kelengahan mereka sendiri. Tidak diragukan bahawa jika terdapat dokumen hak milik, fasal 13 tidak diperlukan dan fasal 23 tidak akan dibaca seperti di dalam bentuknya sekarang. Seperti juga di dalam kes-kes yang mempunyai urusan berkaitan dengan dokumen hak milik, fasal 23 patutlah dibaca untuk memberi kesan bahawa defendan akan melaksanakan suatu pemindahan yang sah dan boleh didaftarkan atas bahagian tersebut selepas pembayaran penuh harga pembelian. Secara biasa, fasal 13 dan 23 telah dimasukkan hanya untuk menyelesaikan suatu keadaan tertentu sahaja — bahawa tidak terdapat dokumen. Fasal 13 dan 23 bukanlah memperuntukkan suatu bebanan yang diwujudkan oleh defendan sehingga pengeluaran dokumen hak milik. Secara munasabah, ini mestilah penafsiran fasal 13 dan 23 (lihat ms 741H–742A).

(3) Tidak boleh dipertikaikan, plaintif-plaintif telah membeli bahagian tersebut yang bebas daripada gadaian-gadaian tanah. Tanpa ragu-ragu, defendan mestilah menebus bahagian plaintif-plaintif tersebut. Hanya pelaksanaan memorandum pindahmilik telah dipersetujui untuk ditangguhkan. Tanpa suatu dokumen hak milik, itu mungkinlah satu-satunya cara penyelesaian. Tetapi selain daripada pendaftaran secara rasmi, plaintif-plaintif berhak selepas pembayaran harga belian secara penuh, kepada faedah-faedah penuh kedua-dua pemunyaan undang-undang dan benefisial bahagian tersebut. Dan bebanan yang sedia ada yang boleh menjadikan pemunyaan undang-undang dan benefisial plaintif tidak efektif dan tidak berguna langsung boleh 'dilepaskan', tidak seperti pendaftaran rasmi hak milik plaintif-plaintif, walaupun tanpa dokumen hak milik. Tidak diragukan,

peruntukan-peruntukan perjanjian tersebut tidak membenarkan defendan untuk menggunakan dan/atau membebankan bahagian tersebut sehingga pengeluaran hak milik strata; peruntukan-peruntukan perjanjian tersebut hanya membenarkan sedemikian sehingga pembayaran harga pembelian secara penuh (lihat ms 742E–H).]

Notes

For cases on sale and purchase of property generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2828–2829.

Cases referred to

Aspdin v Austin (1844) 5 QB 671 (refd)
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1978) 52 AJLR 20 (refd)
Chamber Colliery Co Ltd v Twyerould [1915] 1 Ch 268 (refd)
Chatenay v The Brazilian Submarine Telegraph Co Ltd (1891) 1 QB 79 (refd)
Churchward v R (1865) LR 1 QB 173 (refd)
Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587 (refd)
Duke of Westminister v Guild [1985] QB 688 (refd)
Equity & Law Life Assurance Society plc v Bodfield Ltd (1987) 281 EG 1448 (refd)
Great Western Railway v Bristol Corp (1918) 87 LJ Ch 414 (refd)
Grey v Pearson (1857) 6 HL Cas 61 (refd)
Hudson v Buck (1877) 7 Ch D 683 (refd)
James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583 (refd)
Jodrell, Re (1890) 44 Ch 590 (refd)
Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108 (refd)
Leader v Duffey (1888) 13 App Cas 298 (refd)
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 (refd)
Mackay v Dick & Anor (1881) 6 App Cas 251 (refd)
Pagnan SPA v Tradax Ocean Transportation [1987] 1 All ER 81 (refd)
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724 (refd)
Reardon Smith Line Ltd v Ynguar Hansen-Tangen & Sanko Steamship Co [1976] 1 WLR 989 (refd)
Robertson v French (1803) 4 East 130 (refd)
SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492 (refd)
Smith v Cooke (1891) AC 294 (refd)
St Edmundsbury Ipswich Diocesan Board of Finance & Anor v Clark (No 2) [1975] 1 WLR 468 (refd)
Strand Music Hall Co Ltd, Re (1895) 35 Beav 153 (refd)
Stirling v Maitland (1864) 5 B & S 841 (refd)

Legislation referred to

Contracts Act 1950 ss 32, 33
Strata Titles Act 1985 s 10

Lim Hwah Beng (*HB Lim & Associates*) for the plaintiff.
Allen Yu (*Allen Yu Chin Aun & Associates*) for the defendant.

Jeffrey Tan J: After submissions by learned counsel, this has now become the plaintiffs' application, by this originating summons (encl 2) dated 20 November 1999, for the court's adjudication on the following agreed issue:

> Whether the provisions of the agreement dated 1 June 1995 between the plaintiffs and defendant , and in particular cll 1, 13, 15, 20 and 23, permit the defendant to use and/or encumber the subject property purchased by the plaintiffs from the defendant until the issuance of the strata title to the subject property or only until full payment of the purchase price.

The background facts, narrated by Mr Lim Hwah Beng for the plaintiffs and then most affably confirmed by Mr Allen Yu for the defendant, may be rephrased as follows. By an agreement ('the agreement') dated 1 June 1995 and entered into between the defendant as vendor of the one part and the plaintiffs as purchasers of the other part, the defendant sold and the plaintiffs purchased a commercial unit ('the said parcel') known as parcel No 59, Storey 1 contained in a commercial complex known as Wira Court now erected on land known as HS (D) 16797 PTD 10039 Mukim of Simpang Kanan, District of Batu Pahat ('the said land'). By 18 December 1996, the plaintiffs had fully paid up the purchase price (RM258,432). Hitherto, the said land was already charged parcelto the United Merchant Finance Berhad ('UMFB'). The said land is still charged to UMFB. Presently, Pengurusan Danaharta Nasional Berhad has acquired the rights of UMFB. A strata title in respect of the said parcel is yet to be issued.

Mr Lim contended that the defendant, because of their failure to discharge the parcel, had breached the agreement and therefore entitled the plaintiffs in turn to terminate the agreement. In the affidavit (encl 5) affirmed on their behalf, 'the defendant admitted that they had cash flow problems and that the unit is still encumbered'. 'The defendant pleaded that they would try to resolve their financial problems.' 'However', Mr Lim added, 'the defendant did not say that they would obtain a release of the parcel'. Mr Lim further contended that the defendant must give all rights and all benefits of ownership of the said parcel to the plaintiff. 'The strata title can wait, but all other rights must be handed over.' 'The underlying purpose of cl 15 of the agreement was only bridging finance.' Disagreeing with the defendant who contended in para 12 of encl 5 that cl 15 is permitted the defendant to utilize the said parcel as a loan security until the issuance of the strata title to the unit, Mr Lim added that cl 15 only permitted the said parcel to be encumbered during the period of construction, and whilst the purchase price was still not fully paid.

In his short submission, Mr Yu contended that the clauses of the agreement cannot be enforced, because ss 32 and 33 of the Contracts Act 1950 provide that a contingent contract to do or not do anything if an uncertain event happens cannot be enforced by law unless and until that event has happened, and not before. Then referring to s 10 of the Strata Titles Act 1985, Mr Yu said that strata titles could be applied, albeit that there is a charge. Mr Lim replied that strata titles would not be obtained, so long as there is a charge.

Obviously, to rule on the agreed issue, this court is required to interpret or construct the agreement.

The process of interpretation starts by a consideration of the language used by the parties in the document itself, to ascertain the meaning of the words in the document and to determine (subject to any rule of law) the legal effect or the effect to be given to those words (see *Chatenay v The Brazilian Submarine Telegraph Co Ltd* (1891) 1 QB 79), so as to ascertain further ' ... the mutual intentions of the parties ... as to the legal obligations each assumed by the contractual words in which they sought to express them' (*Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, per Lord Diplock). The intention of parties is strictly the meaning of the words they have used. 'The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion' (*Great Western Railway v Bristol Corp* (1918) 87 LJ Ch 414 per Lord Shaw). Thus, in *Re Jodrell* (1890) 44 Ch 590, Lord Halsbury said:

> I do not know what the testator meant except by the words he has used ... For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document and not to part of it; and having looked at the whole of the document to see, if I can, through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments — and to that extent it may be said that they are canons of construction.

The language used must be considered in the light of the surrounding circumstances and the objects of the contract, in so far as it has been agreed or proved. But it would be erroneous to assume an intention apart from the language used in the instrument and bend the language in favour of the assumed intention (*Leader v Duffey* (1888) 13 App Cas 298), 'to construe an instrument contrary to what the words of the instrument itself convey' (*Smith v Cooke* (1891) AC 294, per Lord Halsbury), 'to introduce uncertainty by starting from the viewpoint of a general rule governing such clauses, and then to resolve the question of construction by reference to it ...(as it is) the court's task is to determine the meaning of the provision, against its contractual and contextual sense' (*Pagnan SPA v Tradax Ocean Transportation* [1987] 1 All ER 81), or 'to construe and apply not the clause which the parties have entered into but the different clause which they might have ... entered into' (*Equity & Law Life Assurance Society plc v Bodfield Ltd* (1987) 281 EG 1448).

In attempting to ascertain the presumed intention of the parties, the court will adopt an objective approach, that is to say that it will consider

what would have been the intention of reasonable persons in the position of the actual parties to the contract. Thus in *Reardon Smith Line Ltd v Ynguar Hansen-Tangen & Sanko Steamship Co* [1976] 1 WLR 989, Lord Wilberforce said at p 996:

> When one speaks of the intention of the parties to the contract, one is speaking objectively — the parties cannot themselves give direct evidence of what their intention was — and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

The court is entitled to look at evidence of the actual factual background known to the parties at or before the date of the contract; accordingly, evidence of the surrounding circumstances (*Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108), of the 'genesis' and of the 'aim' of the transaction, limited however to objective facts, to place the contract in its correct setting — the factual matrix — is admissible. Thus in *St Edmundsbury Ipswich Diocesan Board of Finance & Anor v Clark (No 2)* [1975] 1 WLR 468, Sir John Pennycuick, delivering the judgment of the English Court of Appeal, said at p 477:

> It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

However, the court may not look at the subsequent conduct of the parties to interpret a written contract unless that conduct amounted to a variation of the contract or gave rise to an estoppel (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583).

Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (*Grey v Pearson* (1857) 6 HL Cas 61, per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (*Robertson v French* (1803) 4 East 130). In the case of a word with both an ordinary and a specialized meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialized sense.

There is a general presumption against implying terms into written contracts. Rather, the presumption is that parties who have entered into written engagements with written stipulations have expressed all the conditions by which they intended to be bound under the instrument (*Aspdin v Austin* (1844) 5 QB 671; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108) and care must be taken not to make a contract speak where it was intentionally silent (*Churchward v R* (1865) LR 1 QB 173). The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain (*Duke of Westminister v Guild* [1985] QB 688).

Where the bargain is obviously not complete, the court may imply the missing terms if the following criteria (some of which may overlap) set by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 AJLR 20 are fulfilled:

(i) if it is reasonable (*Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454) and equitable (*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 AJLR 20);

(ii) if it is necessary to give business efficacy to the contract (*The Moorcock* (1889) 14 PD 64);

(iii) if it is obvious (*Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206);

(iv) if it is capable of clear expression (*Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187); and

(v) if it is not inconsistent with the express terms of the contract or its general tenor (*Lynch v Thorne* [1956] 1 WLR 303).

A court, subject to the qualification that there is absent a contrary intention, would be more ready to imply a term in cases 'where a special relationship such as those recognized by the law exists' (eg banker and client, employer and employee, principal and agent, vendor and purchaser of immovable property, landlord and tenant) than in cases where no such special relationship exists, 'in order to make the particular relationship workable' (*Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587 at p 609, per Gopal Sri Ram JCA).

In general, a term is necessarily implied in a contract that neither party shall actively prevent the other from performing it, which itself is a breach of the contract. The classic formulation of that implied term is that of Cockburn CJ in *Stirling v Maitland* (1864) 5 B & S 841:

> I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative.

There is also imposed on parties a general duty to co-operate in the performance of a contract. The duty includes a duty not to prevent the fulfilment of conditions (see *Mackay v Dick & Anor* (1881) 6 App Cas 251, where the buyer refused to give a machine a proper trial, and the House of Lords held it was a breach of contract) and to act bona fide (perhaps reasonably), where the condition to be fulfilled is one which is dependent on the discretion of one party to the contract, to procure the fulfilment of the condition (*Hudson v Buck* (1877) 7 Ch D 683).

To arrive at the true interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Co Ltd v Twyerould* (1893) [1915] 1 Ch 268; *Re Jodrell*). As a corollary of the principle that a document must be construed as a whole, all parts of it must be given effect where possible (*Re Strand Music Hall Co Ltd* (1895) 35 Beav 153) and no part of it should be treated as inoperative or surplus (*SA Maritime et Commerciale of Geneva v*

Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492) unless it is impossible to reconcile it with another and more express clause in the same deed (*Re Strand Music Hall Co Ltd*).

But the two most important and comprehensive rules of general application in construing a written instrument are: (i) that it shall, if possible, be so interpreted *ut res valeat potius quam pereat*; and (ii) that such a meaning shall be given to it as to carry out and effectuate to the fullest extent the intention of the parties. Put together, *benigne faciendae sunt interpretationes ut res magis valeat quam pereat*, the rule is that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. Every document ought to be construed, if possible, so as to make it operative. 'It boils down to this. Where a contract is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous then the court may imply a term in order to uphold the transaction' (*Datuk Yap Pak Leong v Sababumi* at p 53, per Gopal Sri Ram).

The pertinent clauses, so it was agreed, of the agreement, read as follows:

> Clause 1 — Sale And Purchase of Property
>
> The Vendor hereby agrees to sell and the purchaser hereby agrees to purchase the said parcel free of all encumbrances other than those imposed by the provisions of the agreement and the conditions expressed and implied in the separate strata title to the said parcel when issued, subject to the terms and conditions hereinafter contained and the special conditions (if any) contained in the Fourth Schedule hereto.
>
> Clause 13 — Issue Document of Title
>
> The Vendor shall at its own costs and expense obtain issue of a separate strata title to the said parcel but any delay in obtaining such separate strata title shall not be a ground for any delay by the purchaser in the payment on due dates of any of the instalments of the Purchase Price set out in the Third Schedule hereto and the interest thereon (if any) and the Vendor shall not in any way, be liable to the purchaser for any loss, damages cost, fee or expenses howsoever arising or incurred due to any delay in the issue of the separate strata title to the said parcel.
>
> Clause 15 — Consent to Encumber
>
> (1) The purchaser hereby do irrevocably consent that the vendor may charge or in anyway encumber the said parcel provided always that nothing shall release the Vendor of its obligations to transfer the said parcel free of all registrable encumbrances in accordance with cl 1 of this Agreement.
>
> (2) The purchaser shall not encumber the said parcel including the lodging or the causing of the lodging of a caveat on the said land or any part thereof in default of which the purchaser shall indemnify and keep safe the vendor against any costs, fees, expenses, damages, claims, proceedings, demands or actions arising therefrom.

Clause 20 — Delivery of Vacant Possession

Subject to cl 31 hereof or of any delay by whatsoever reasons owing to the purchaser and provided always that the Purchaser shall have paid to the vendor all instalments and monies payable under this agreement as and when they become due, the said parcel shall be completed by the vendor and vacant possession shall be handed over to the purchaser within thirty-six (36) months from the date of this agreement and if the parcel is not completed and ready for delivery of vacant possession to the purchaser agreed liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum on such part of the Purchase Price of the said parcel as shall have been paid to the vendor from such date of expiry of the said thirty-six (36) months to the date of actual completion and delivery of vacant possession of the said parcel to the purchaser shall be paid by the vendor.

Clause 23 — Transfer of parcel

The vendor shall upon the issuance of the document of title to the said parcel and provided that the Purchaser shall have paid all monies under cl 3 hereof in accordance with the Third Schedule Hereto and all interest and all other monies whatsoever due under this agreement and shall have performed and observed all the terms and conditions of this agreement, execute a valid and registrable transfer of the said parcel in favour of the purchaser his heir or permitted lawful assignee, as the case may be, free from all encumbrances other than those imposed by the provisions of this agreement and the conditions expressed and implied in the separate strata title to the said parcel.

Looking at the agreement as a whole, it is most evident that the intention of the plaintiffs was to buy whilst the intention of the defendant was to sell the said parcel. Put differently, it was the intention of the parties, in the case of the defendant to liquidate the said parcel for money, and in the case of the plaintiffs to exchange money for the said parcel. That mutual exchange was at the heart and soul of the bargain. And all provisions of the agreement functioned, so it must be, to implement and to see through that bargain. The provisions of the agreement, or any of them, were not there to defeat that bargain. For it is just not logical that there could be an agreement to break the very same agreement. As said, the provisions of the agreement must be read *ut res valeat potius quam pereat*, to uphold the bargain, if possible, and to carry into effect and not defeat the bargain.

Essentially, the sum total of the contractual obligation of the plaintiffs was to pay the full purchase price. And that, it was agreed, the plaintiffs had performed.

'Where a purchaser under a contract of sale had paid the full purchase price and entered into possession of the land under an expectancy of title, the courts have held that the purchaser was the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of mere delay or laches' (Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary* (2nd Ed) at pp 202–203). As a rule, that is unless otherwise provided, a vendor of immovable property free from encumbrances is obliged, immediately upon his receipt of the full purchase price from the purchaser, to convey the full benefits of both the legal and beneficial

A ownership of the immovable property to the purchaser. Inter alia, that vendor is obliged to execute and deliver a good and registrable memorandum of transfer of the immovable property free from encumbrances together with the document of title to the purchaser. Indeed, 'one of the main obligations of a vendor under a contract for the sale of land is to give a purchaser a title 'free from all encumbrances'. The effect of such B an obligation is to ensure that the purchaser on registration, acquires a title with no existing encumbrances which would in any way fetter the purchaser's right to deal with the land subsequently or which would affect the purchaser's enjoyment of the land' (*Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai at p 186). 'A vendor is under a general duty to C deliver a title free from all encumbrances on the date for completion and not on the date the contract was entered into. It is therefore, quite possible for a vendor to deal with the land during this interim period with the understanding that any such encumbrance on the land would be discharged on the date for completion' (*Sale and Purchase of Real Property in Malaysia* at p 187). And it was no different in the present case, although the strata D title was not yet issued.

Now the plaintiffs entered into the agreement knowing fully well, for the second and fourth recitals to the agreement disclosed so, that the said land was already charged and that the strata title to the said parcel was yet to be applied, and therefore nowhere near yet to be issued. However, the plaintiffs were required, by cl 3 of the agreement, to pay the purchase price E in accordance with the completed stages of construction of the said parcel, whilst the defendant was committed (cl 20) to complete and deliver vacant possession of the said parcel to the plaintiffs within 36 months. Both parties agreed, in other words, that 36 months from the execution of the agreement shall be the date for completion. But the matter of the issuance of a strata F title, even if applied for, was not a matter within the defendant's control. And it could end up with the defendant not being able, in spite of all efforts to obtain a strata title, to deliver the strata title to the plaintiffs within those 36 months. For that reason, cl 13 provided that 'any delay in obtaining such separate strata title shall not be a ground for any delay by the purchaser in the payment on due dates of any of the instalments of the purchase price set G out in the Third Schedule hereto and the interest thereon (if any) and the vendor shall not in any way be liable to the purchaser for any loss, damages, cost, fee or expenses howsoever arising or incurred due to any delay in the issue of the separate strata title to the said parcel'. Also for that reason, cl 23 provided that the defendants shall execute a valid and registrable transfer of the said parcel 'upon the issuance of the document of title to the said H parcel'. And given the reality that the issuing authority might indeed delay the issuance of a strata title, it was just fair to provide so. Clearly, cll 13 and 23 were intended to protect the defendant from liability for any official delay in the issuance of the strata title occasioned by the issuing authority. Clauses 13 and 23 were not intended to shield the defendant from liability for their own delay. Undoubtedly, if there was a document of title, cl 13 I would not have been required, and cl 23 would not read as in the present form. Rather, just as in cases of all dealings with document of titles, cl 23 should read, to the effect, that the defendant shall execute a valid and

registrable transfer of the said parcel upon full payment of the purchase price. Plainly, cll 13 and 23 were so phrased, only to deal with the one particular circumstance — that there was no document of title. Clauses 13 and 23 were not to provide for an encumbrance created by the defendant until the issuance of a document of title. Reasonably, that must be the construction of cll 13 and 23.

Granted, the plaintiffs gave their consent, in the first limb of cl 15(1) of the agreement, to the creation of land charges by the defendant. But that consent was not without condition. The rider to the first limb of cl 15(1) states, 'provided always that nothing shall release the [defendant] of its obligations to transfer the said parcel free of all registrable encumbrances in accordance with cl 1 of this agreement'. The agreement says, in clear and unambiguous language in cl 1 of the agreement, that the defendant agrees to sell and the plaintiffs agree to purchase the said parcel free of all encumbrances (meaning charges, caveats or other adverse claims) other than those imposed by the provisions of the agreement (meaning the covenants of the purchasers, common rights and liabilities, and like provisions) and the conditions expressed and implied in the separate strata title to the said parcel when issued (meaning the express conditions and restrictions of interest imposed by the State Authority or by the National Land Code itself) subject to the terms and conditions hereinafter contained and the special conditions (if any) contained in the Fourth Schedule hereto (meaning the position and area of the said parcel). The agreement says, in cl 23 of the agreement, that the defendant 'shall execute a valid and registrable transfer of the said parcel ... free from all encumbrances other than those imposed by the provisions of this agreement and the conditions expressed and implied in the separate strata title to the said parcel'. Unquestionably, the plaintiffs purchased the said parcel free from land charges. Beyond question, the defendant must redeem the said parcel for the plaintiffs. Just the execution of a valid and registrable memorandum of transfer was agreed to be deferred, until the issuance of a document of title. Only formal transfer was deferred. Without a document of title, that was probably the only solution. But other than formal registration, the plaintiffs were entitled, upon payment of the full purchase price, to the full benefits of both the legal and beneficial ownership of the said parcel. And the existing encumbrance which could render the plaintiffs' legal and beneficial ownership effectively or substantially worthless could be 'discharged', unlike the formal registration of the plaintiffs' title, even without a document of title.

Without doubt, the provisions of the agreement do not permit the defendant to use and or encumber the said parcel until the issuance of the strata title, only until full payment of the purchase price. Lastly, costs of this application is ordered, since the agreed issue is being answered in favour of the plaintiff, by the defendant.

Order accordingly.

Reported by Jafisah Jaafar